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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE LARRY A. BURNS)

UNITED STATES OF AMERICA, Plaintiff, v. **ANA BERENICE PALOS-MONTES**, Defendant.	Case No.: 08CR1726-LAB DATE: August 25, 2008 TIME: 2:00 p.m. NOTICE OF MOTIONS AND MOTIONS *IN LIMINE* TO: 1) PRECLUDE EVIDENCE UNDER 404(B); 2) GRANT ATTORNEY CONDUCTED VOIR DIRE; 3) EXCLUDE 403 EVIDENCE; 4) PRECLUDE EXPERT TESTIMONY ; 5) PROHIBIT STREET VALUE TESTIMONY; 6) EXCLUDE EVIDENCE OF STRUCTURE; 7) PRECLUDE COCAINE FROM COURTROOM; 8) ORDER PRODUCTION OF SUPPLEMENTAL REPORTS AND TECS; 9) COMPEL THE GOVERNMENT TO ESTABLISH CHAIN OF CUSTODY; AND, 10) SUPPRESS STATEMENTS.

TO: KAREN HEWITT, UNITED STATES ATTORNEY, and
AARON CLARK, ASSISTANT UNITED STATES ATTORNEY

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PLEASE TAKE NOTICE that, on August 25, 2008, at 2:00 p.m., or as soon thereafter as counsel may be heard, the accused, Ana Berenice Palos-Montes, by and through her attorneys, Michelle Betancourt, and Federal Defenders of San Diego, Inc., will ask this Court to enter an order granting the motions outlined below.

MOTIONS

Ana Berenice Palos-Montes, by and through his counsel, Michelle Betancourt, Candis Mitchell, and Federal Defenders of San Diego, Inc., brings these motions *in limine* and other trial motions to:

1) Preclude Evidence under 404(b) and 609;
2) Grant Attorney Conducted Voir Dire;
3) Exclude 403 Evidence;
4) Preclude Testimony from Experts Without Notice;
5) Prohibit Street Value Testimony;
6) Exclude Evidence of Structure ;
7) Preclude Marijuana from Courtroom;
8) Order Production of Supplemental Reports and TECS;
9) Compel the Government to Establish Chain of Custody; And,
10) Preclude Documents and other Evidence of Poverty.

Ms. Palos-Montes brings this motion pursuant to the Fourth, Fifth and Sixth Amendments to the United States Constitution, Fed. R. Crim. P. 12, 16 and 26, and all other applicable statutes, case law and local rules. This motion is based on the previously submitted statement of facts and memorandum of points and authorities.

Respectfully submitted,

Dated: August 18, 2008

/s/ *Michelle Betancourt*
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE LARRY A. BURNS)

UNITED STATES OF AMERICA,	)	CASE NO.: 08CR1726-LAB
	)	
Plaintiff,	)	DATE: August 25, 2008
	)	TIME: 2:00 p.m.
v.	)	
	)	
ANA BERENICE PALOS-MONTES,	)	**MEMORANDUM OF POINTS AND**
	)	**AUTHORITIES IN SUPPORT OF**
	)	**DEFENDANT'S MOTIONS IN LIMINE**
Defendant.	)	

I.

THE COURT SHOULD PRECLUDE THE GOVERNMENT FROM INTRODUCING EVIDENCE UNDER FEDERAL RULE OF EVIDENCE 404(b)

Federal Rules of Evidence 404(b) requires that the government provide "reasonable notice in advance of trial" of any evidence of "other crimes, wrongs, or acts" it plans to introduce. Fed. R. Evid. 404(b). The notice requirement is triggered when timely requested by the defendant. United States v. Vega, 188 F.3d 1150, 1154 (9th Cir. 1999). On August 15, 2008, the government provided a letter indicating its intent to introduce "other acts" evidence pursuant to Rule 404(b). Without any further information, the letter indicated that it sought to introduce "evidence of the defendant's prior border crossings in the load vehicle. . ." because this evidence is "directly relevant to the defendant's knowledge of the cocaine found in the load vehicle on April 15, 2008." This "notice" is insufficient and does not satisfied the notice requirements set forth in Federal Rule of Evidence 404(b).

The government carries the burden of showing how any other acts evidence is relevant to one or more issues in the case; thus, "it must articulate precisely *the evidential hypothesis* by which a fact of consequence may be inferred from the other acts evidence." United States v, Mehrmanesh, 689 F.2d 822, 830 (9th Cir. 1982) (citing United States v. Hernandez-Miranda, 601 F.2d 1104, 1108 (9th Cir. 1979)) (emphasis added); accord United States v. Brooke, 4 F.3d 1480, 1483 (9th Cir. 1993). It is not sufficient to state merely that the other act will be offered for one of the enumerated purposes. Instead, the government must state precisely how the fact of consequence may be inferred from the other acts evidence. Because the government has failed to articulate any precise 404(b) evidence it intends to introduce, nor any evidentiary hypothesis by which a fact of consequence will be shown by this evidence, any and all other acts evidence must be excluded under Rules 401 and 404(b).

Finally, prior to any admission of 404(b) evidence, the Court must consider whether the evidence would be more prejudicial than probative. In this case, any such evidence would be unduly prejudicial and cause confusion for the jury. Therefore, the Court must exclude any 404(b) evidence under Rule 403.

II.

MS. PALOS-MONTES COUNSEL SHOULD HAVE THE OPPORTUNITY TO VOIR DIRE THE JURY

Pursuant to Fed. R. Crim. P. 24(a), to provide effective assistance of counsel and to exercise Ms. Palos-Montes' right to trial by an impartial jury, defense counsel requests the opportunity to personally voir dire the prospective members of the jury.

III.

INTRODUCTION OF PARTICULAR EVIDENCE IS HIGHLY PREJUDICIAL WITHOUT ADDING ANY PROBATIVE VALUE TO THIS TRIAL, THUS MERITING EXCLUSION UNDER FRE 403

Federal Rule of Evidence 403 allows the Court to exclude relevant evidence if the "[p]robative value is substantially outweighed by danger of unfair prejudice."

A. Mug Shots

There were "mug shot"-style pictures of Ms. Palos-Montes taken while she was in custody. These pictures have no place at this trial. This is not an identity case: Ms. Palos-Montes does not dispute that she is the individual arrested. Accordingly, these pictures have no probative value. In contrast, however, their appearance automatically puts one in mind of a criminal, and is not unlike forcing a defendant to wear jail-issued clothing while in trial. Under FRE 403, these pictures are highly prejudicial and devoid of probative value. They should be excluded from trial as a result.

B. Pre-Arrest Demeanor

At trial, the government may seek to introduce evidence of Ms. Palos-Montes' pre-arrest silence or demeanor. Such testimony is improper. See United States v. Whitehead, 200 F.3d 634, 637-40 (9th Cir. 2000). Thus, the government should be prohibited from eliciting such testimony regarding Ms. Palos-Montes' pre-arrest demeanor. To the extent the government would seek to introduce evidence of Ms. Palos-Montes' pre-arrest demeanor as substantive evidence of guilt or in impeachment, she files this anticipatory motion. The government should be prohibited from introducing such evidence.

1. "Nervousness" Testimony is Largely Irrelevant and Overly Prejudicial

First, reactions to this type of situation will vary widely based on various factors, including one's life experiences, educational level, age, gender, health, medical conditions, diet, and the circumstances surrounding the arrest. Thus Ms. Palos-Montes' reaction, if any, is not probative of anything. See Fed. R. Evid. 401, 402. Laywitness testimony regarding nervousness, absent some prior knowledge of the defendant, has minimal, if any, relevance. See United States v. Pineda-Torres, 287 F.3d 860, 866 (9th Cir. 2002) (describing an immigration officer's testimony about the defendant's "apparent nervousness" only "marginally probative" on the issue of knowledge); United States v. Wald, 216 F.3d 1222, 1227 (10th Cir.2000) (*en banc*) (evidence of nervousness "is of limited significance"[,] particularly when [the agent] had no prior acquaintance with the [defendant].")

Second, such evidence is potentially highly prejudicial, and it should not be allowed on that basis as well. See Fed. R. Evid. 403; Jenkins v. Anderson, 447 U.S. 231, 239 (1980); United States v. Hale, 422 U.S. 171, 180-81 (1975); Stewart v. United States, 366 U.S. 1, 5 (1961); Grunewald v United States, 353 U.S. 391, 424 n.5 (1957).

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2. "Nervousness" Testimony Violates Rules 701 & 704(b)

Such evidence should be excluded if it is couched in terms of a law enforcement witness' personal opinion about Ms. Palos-Montes' behavior, *i.e.,* "she was nervous." An inspector or agent's personal opinion is irrelevant and such opinion testimony based on no prior knowledge of the defendant, and upon a very limited observation opportunity, violates Fed. R. Evid. 701. Rule 701 provides that a lay witness can only testify to opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or to the determination of a fact in issue and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. In Gonzalez-Rivera v. INS, 22 F.3d 1441 (9th Cir. 1994), this Circuit held that an INS agent's testimony at a suppression hearing that an individual was nervous must be disregarded because it was not based upon "reliable, objective evidence." Id. at 1447. There, when explored, the basis for the agent's testimony was that the individual appeared to have a "dry mouth." The court stated that absent reliable, objective testimony that people who are nervous have a dry mouth, as opposed to just being thirsty, this inference was nothing more than "subjective feelings [which] do[] not provide any rational basis for separating out the illegal aliens from the American citizens and legal aliens." Id. Likewise, testimony by the primary agent that Ms. Palos-Montes was "nervous" is nothing more than a subjective judgment based upon no prior knowledge of him and should not be considered by the jury.

IV.

THE COURT SHOULD PRECLUDE EXPERT TESTIMONY

Federal Rule of Criminal Procedure 16(a)(1)(E) mandates that "[a]t the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial . . . . The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications." The obligation to provide this material is ongoing, continuing prior to and during trial. Fed. R. Crim. P. 16(c). When a party fails to comply with the discovery rules set forth in Rule 16, exclusion is a proper remedy. Fed. R. Crim. P. 16(d)(2). See also Advisory Committee Notes to 1997 Amendment (asserting that "[u]nder rule 16(a)(1)(E), as amended in 1993, the defense is entitled to disclosure of certain information about expert witnesses which the government intends to call during the trial" (emphasis provided.).

Early in this case, Ms. Palos-Montes filed pretrial motions requesting notice of any expert witnesses that the government intends to call at trial, including rebuttal. Thus far, the government has given notice of only three expert witnesses they anticipate testifying -- Lisa Kitlinski (chemical and drug analysis), ICE Senior Special Agent Roger A. Carr (drug value) and CBP Officer Ted Swartzbaugh (TECS expert). If the government seeks to offer any further expert testimony without 1) timely notifying Ms. Palos-Montes of the expert and his or her qualifications; 2) providing a summary of the expected testimony; and 3) providing a summary of the bases of the expert's opinion, this Court should exclude such witnesses from testifying at trial. Ms. Palos-Montes respectfully requests that this Court grant a motion *in limine* accordingly, to give effect to the discovery requirements of Rule 16, and to afford the accused the opportunity to prepare her defense in this case.

V.

THE COURT SHOULD EXCLUDE TESTIMONY REGARDING THE VALUE OF THE NARCOTICS

Ms. Palos-Montes objects to any expert testimony about the value of the narcotics seized in this case. This testimony is irrelevant and therefore inadmissible under Rule 402. Even if minimally probative, this evidence should be excluded under Rule 403 because it is unduly prejudicial. If the government does not introduce value testimony, Ms. Palos-Montes offers to stipulate that the quantity of narcotics in this case is a distributable, not personal use, quantity. This obviates the need for value testimony, and also counsels for prohibiting the government from bringing the narcotics into the courtroom in an attempt to prejudice the jury. See Fed. R. Evid. 403; United States v. Merino-Balderrama, 146 F.3d 758, 762 (9th Cir. 1998) (In "Old Chief [the Supreme Court] held that a defendant's offer to stipulate to an element of a crime is relevant evidence that must be factored into a district court's analysis under [Federal Rule of Evidence] 403.").

One of the major reasons that the government often seeks to introduce value testimony is to demonstrate that the defendant must have known of the presence of drugs in the car. Because the drugs are valuable, the argument runs, drug smugglers would not entrust them to unknowing couriers. The Federal

Rules of Evidence and controlling case law, however, specifically forbid this chain of inference in the form of expert testimony.

Rule 704 provides:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Fed. R. Evid. 704.

Ninth Circuit case law holds that this rule applies any time an expert seeks to opine on a defendant's knowledge, willfulness, or other mental state. See United States v. Morales, 108 F.3d 1031, 1036 (9th Cir. 1997) ("[t]he language of Rule 704(b) is perfectly plain. It does not limit its reach to psychiatrists and other mental health experts. Its reach extends to all expert witnesses"); United States v. Webb, 115 F.3d 711 (9th Cir. 1997) (holding it impermissible under Rule 704(b) for expert to testify, even in hypothetical form, whether defendant knew of weapons concealed in car.). Indeed, knowledge—the primary contested issue in this trial—is a mental state. Any proposed expert who would opine (directly or indirectly) that Ms. Palos-Montes must have known that the vehicle she was driving contained marijuana testifies to her mental processes or condition. Whatever the form, the government may not use the trappings of "expertise" to bolster speculation regarding Ms. Palos-Montes's alleged knowledge. This testimony is expressly forbidden by Rule 704 and by Ninth Circuit law. Drug value testimony must not be used to circumvent these established evidentiary rules.

A. The Government Should Be Precluded from Eliciting "Structure Testimony" From the Value Expert.

Typically the government proffers that its value expert will explain that drivers have the critical responsibility of passing by law enforcement officials who are trained to detect persons transporting loads of narcotics. This specific testimony must be excluded. This proposed opinion is nothing more than "structure testimony" offered through a value expert. As a result, it invites reversible error.

In United States v. Vallejo, 237 F.3d 1008 (9th Cir. 2001), amended, 246 F.3d 1150 (9th Cir. 2001), the Ninth Circuit held that structure testimony is inadmissible in a non-complex, non-conspiracy drug smuggling case. As the court wrote, "[t]o admit this testimony on the issue of knowledge, the only issue in the case, was unfairly prejudicial, and an abuse of discretion under Rule 403." Id. at 1017. Testimony as to the "critical responsibility" of drivers presupposes a compartmentalized, organized drug smuggling network. It assumes that the drivers know that drugs exist in the vehicles, and couches the endeavor in terms of a "job" willingly taken on by the driver of the car. This testimony essentially seeks to assume out of existence the key issue in this trial: whether Ms. Palos-Montes knew that drugs were in the vehicle she was driving. Such testimony is improper and must be excluded.

B. The Court Should Exclude any Expert Testimony on "Retail Value" Because it is It Irrelevant and Highly Prejudicial.

Even assuming that this testimony were otherwise admissible, Rule 403 prohibits expert testimony on the street value of marijuana at trial. According to the government's argument, this testimony is relevant because drug trafficking organizations would not entrust this "valuable commodity" to an unknowing person. Several problems exist with this argument. First, there is absolutely no evidence that any vast drug trafficking organization exists in this case: the government's argument rests on facts that are not, and will not, be in evidence. Second, this reasoning rests on rank speculation as to the mental processes of unknown persons. The government cannot simply proffer evidence on what these vague and unknown "drug traffickers" would or would not do in a given situation. There is virtually no probative value in this proposed testimony.

In contrast, this testimony will result in substantial prejudice to Ms. Palos-Montes. The sheer monetary value of this marijuana could inflame the passions of the jury, and distract them from Ms. Palos-Montes's lack of knowledge -- the true issue in this case. The amount of money at stake could well suggest that a vast drug empire is implicated here; indeed, this inference is a key premise in the government's relevance argument. This insinuation, however, has absolutely no evidentiary support. Beyond the government's attenuated and factually unsupported argument that the value of these drugs demonstrates the defendant's knowledge, absolutely no probative value exists in this testimony. The prejudice, in contrast, is extreme. This testimony should therefore be independently excluded under FRE 403.

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C. The Court Should Preclude the Value Expert From Testifying to Irrelevant Experience Seizing Large Quantities of Narcotics

The government's value expert lists on his qualification summary experience dealing with large-scale narcotics seizures. Were this Court to allow the value expert to testify to these experiences, the jury might get the wrong impression that this case, too, is linked to larger, more serious seizures. Given that the value expert readily can demonstrate his qualifications without resorting to tales of dramatic drug seizures, Ms. Palos-Montes requests that this testimony be precluded. See Fed. R. Evid. 401, 402 and 403.

VI.

THIS COURT SHOULD EXCLUDE ANY EXPERT TESTIMONY DESCRIBING THE STRUCTURE OF SUPPOSED DRUG SMUGGLING ORGANIZATIONS, AS IT IS IRRELEVANT, IMPROPER UNDER FRE 702 AND 703, AND UNDULY PREJUDICIAL UNDER FRE 403.

Under this Circuit's precedent United States v. Vallejo, 237 F.3d 1008 (9th Cir. 2001), and United States v. McGowan, 274 F.3d 1251 (9th Cir. 2001), structure testimony may not be permitted in this trial. This sort of "expert" testimony not only fails the balancing test set forth by FRE 403, but also is literally irrelevant and an abuse of discretion under FRE 401. Vallejo 237 F.3d at 1017. The same problem exists with any organizational structure evidence in this case. The government has not charged Ms. Palos-Montes with conspiracy. No evidence whatsoever suggests that a vast drug trafficking network played any role in the instant offense. Any attempt to connect Ms. Palos-Montes to a vast drug empire that has not been alleged and has not been proven violates FRE 401, 403, and Ninth Circuit case law. A motion *in limine* excluding such evidence should be granted accordingly.

VII.

THE PRESENCE OF COCAINE IN THE COURTROOM IS HIGHLY PREJUDICIAL, MINIMALLY PROBATIVE AT BEST, AND THUS PROPERLY EXCLUDED UNDER FRE 403.

At trial, the government may insist on presenting the actual packages of cocaine seized to the jury. In this particular case, in which Ms. Palos-Montes' knowledge of the drugs is the only contested issue, this evidence is highly inflammatory yet has virtually no probative value as to any fact in dispute. It must be excluded under FRE 403.

FRE 403 asserts that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Presentation of the marijuana seized in this case to the jury runs afoul of this evidentiary rule.

It is feared that the government may attempt to inflame the passions of the jury through gratuitous display of the cocaine seized in this case. In the past, some Assistant United States' Attorneys have taken every opportunity to handle bags of narcotics, passing them before the jury, and moving them about the courtroom. A few have gone so far as to wear blue chemical resistant gloves when handling narcotic substances, further attempting to poison the jury through dramatics. This physical evidence has no place at this trial. Because the presence of cocaine seized is undisputed in this case, there is simply no reason to bring this physical evidence into the courtroom. This lack of probative value, however, stands in contrast to the highly prejudicial nature of this contraband. Many jurors will no doubt be scandalized by the nature of the drugs involved in this case. In sum, this evidence proves no issue that is in dispute, yet threatens to badly prejudice Ms. Palos-Montes. For these reasons, Ms. Palos-Montes respectfully requests that this evidence be excluded from trial.

VII.

THIS COURT SHOULD ORDER PRODUCTION OF "SUPPLEMENTAL REPORTS" AND TECS

Pursuant to Rule 16 of the Federal Rules of Criminal Procedure and upon request of the defense, the government has a duty to turn over any reports in its possession that are material to the preparation of the defendant's defense. The defense has requested such reports in its motion for discovery.

A. Production of Supplemental Reports

Ms. Palos-Montes requests disclosure of any "supplemental reports" generated in this case. It has come to Ms. Palos-Montes's attention that the government's recent practice is to not disclose these "supplemental reports." These reports generally memorialize later investigation of the case and can include information that confirms a defendant's statements made at the border. Additionally, pre-trial disclosure will avoid unnecessary delay at trial should the reports become producible under Jencks. See, e.g, Fed. R. Crim.

P. 26.2(d). If the government contends that any "supplemental report" generated in this case is not discoverable, Ms. Palos-Montes requests that the Court view this report *in camera.*

B. Production of Any TECS or Other Computer-Generated Hits Related to Ms. Palos-Montes, or the Vehicle That Contained the Narcotics

Ms. Palos-Montes requests the Court to order the government to produce any "TECS" or other computer-generated hits related to her referral to secondary on the day of her arrest and any TECS related to the car she was driving when she was arrested.

IX.

THE COURT SHOULD REQUIRE THE GOVERNMENT TO ESTABLISH CHAIN OF CUSTODY

Ms. Palos-Montes fully expects the government to adhere to the evidentiary requirements established by Fed. R. Evid. 901 concerning the authentication of physical evidence. Should the government seek to admit the alleged cocaine seized in this case, establishment of a "chain of custody" is required to establish that the drug evidence presented at trial is indeed the same drug evidence that had a role in the events in issue.

As the alleged cocaine seized in this case is "an object connected with the commission of a crime, the proponent must also establish the chain of custody." Gallego v. United States, 276 F.2d 914, 917 (9th Cir.1960). Additionally, the government "must introduce sufficient proof so that a reasonable juror could find that the items in the bag are in 'substantially the same condition' as when they were seized." Id.

XI.

THE COURT MUST SUPPRESS ANY STATEMENTS BY MS. PALOS-MONTES

A. Ms. Palos-Montes Requests a Hearing Pursuant to 18 U.S.C. § 3501 Concerning The Admissibility Of Any Statements That The Government Intends to Use Against Her at Trial.

This Court should conduct an evidentiary hearing to determine whether any statements made by Ms. Palos-Montes' should be admitted into evidence. Under 18 U.S.C. § 3501(a), this Court is required to determine, outside the presence of the jury, whether any statements made by Ms. Palos-Montes were voluntarily made. In addition, § 3501(b) requires this Court to consider various enumerated factors, including whether Ms. Palos-Montes understood the nature of the charges against her and whether she understood her rights.

Moreover, section 3501(a) requires this Court to make a factual determination. Where a factual determination is required, courts are obligated to make factual findings by Fed. R. Crim. P. 12. See United States v. Prieto-Villa, 910 F.2d 601, 606-10 (9th Cir. 1990). Because "'suppression hearings are often as important as the trial itself,'" Id. at 610 (quoting Waller v. Georgia, 467 U.S. 39, 46 (1984)), these findings should be supported by evidence, not merely an unsubstantiated recitation of purported evidence in a prosecutor's responsive pleadings.

XI.

CONCLUSION

For the foregoing reasons, Ms. Palos-Montes respectfully requests that this Court grant these motions *in limine*, as well as these other motions for trial.

Respectfully submitted,

/s/ *Michelle Betancourt*

DATED: August 18, 2008

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. **ANA BERENICE PALOS-MONTES,** Defendant.	Case No. 08CR1726-LAB PROOF OF SERVICE

Counsel for Defendant certifies that the foregoing pleading is true and accurate to the best of her information and belief, and that a copy of the foregoing document has been served via CM/ECF this day upon:

Aaron Clark
U S Attorney CR
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Dated: August 18, 2008

s/ Michelle Betancourt
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